CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 154

JOHN W. BLODGETT

vs.

CHARLES HOLDEN, COLLECTOR OF INTERNAL REVENUE

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED DECEMBER 24, 1927

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SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 4631

JOHN W. BISSELL, Plaintiff in Error,

vs.

CHARLES HOEGE, Collector of Internal Revenue, Defendant in Error

Error to the District Court for the Western District of Michigan

Before: Denison and Moorman, Circuit Judges, and Westenhaver, District Judge.

STATEMENT OF FACTS

PER CURIAM:

This action is one to recover back taxes paid upon transfers by gift, levied and exacted under Sections 319 to 324 of the Revenue Act of 1924, approved June 2d, 1924 (43 Stat. 253, 313).

Upon a motion in the nature of a general demurrer to the plaintiff's amended declaration, the District Court held that no cause of action was stated and rendered judgment for defendant. The facts are undisputed.

Plaintiff, during the calendar year 1924, was a resident of the United States. During that calendar year he transferred by gift property amounting in value to $872,025.66. Exclusive of gifts for charitable, public and other similar purposes which are exempt, the total amount of such gifts was $861,186.02. Of the total not exempt as gifts to charities, etc., $843,086.00 represented gifts made prior to June 2d, 1924, the date the Revenue Act of 1924 became effective, and $6,900.02 only represented transfers by gifts made after that date. Of the total gifts made before the law [fol. 2] was enacted and became effective $818,086.02 consisted of bonds issued by states or political subdivisions thereof. A specific exemption of $50,000.00 is allowed by the

Revenue Act. The net amount of the plaintiff's transfers by gift during the calendar year 1924, subject to tax, was therefore the sum of $800,196.92. On March 14, 1925, plaintiff, under protest that there was no valid law authorizing the exaction of the tax, paid to the defendant the sum of $52,023.52, the amount of tax provided by the Revenue Act. On the same day he made claim for refund, which was denied. These transfers by gift were all inter vivos, and no contention was or is made on behalf of the United States that they were gifts or transfers made in contemplation of death.

The district judge was of opinion that the tax levied by said sections of the Revenue Act of 1924 was properly levied and collected and that said Revenue Act was in no respect invalid. Upon like facts a contrary holding has been made by the United States District Court for the Southern District of New York. See 10 Fr. (2nd) 813. We are of the opinion that the provisions of Sections 319 to 324 of said Revenue Act were intended to subject these gifts to the tax so levied and paid, and that plaintiff is not entitled to recover back any part of the taxes so paid, if said provisions are not in excess or violation of the powers conferred upon Congress by the Constitution. We therefore desire, for the proper decision of this case, the instructions of the Supreme Court upon the following propositions of law.

QUESTIONS CERTIFIED

(1) Are the said provisions of Sections 319 to 324 of the Revenue Act of 1924 unconstitutional as applied to transfers of property by gift, under the circumstances above stated, because the tax so imposed is a direct tax and has not been apportioned, as is required by Clause 3, Section 2, and Clause 4, Section 9 of Article I of the Constitution?

(2) Are said provisions unconstitutional insofar as they impose and levy a tax upon transfers of property by gifts inter vivos, not made in contemplation of death, and made prior to the enactment of said Revenue Act of 1924, either because the same is a direct tax and unapportioned, or because it is a taking of the property of the donor or donee without due process of law, or for public use with-

out just compensation, in violation of the Fifth Amendment to the Constitution?

(3) Are said provisions of said Revenue Act unconstitutional and void as applied to transfers of property [fol. 3] by gift, under the circumstances above stated, insofar as it imposes said tax upon transfers of property consisting of bonds and other securities issued by a state or some political subdivision thereof for public uses?

Dated December 10, 1926.

A. C. Denison, Circuit Judge. Chas H. Moorman, Circuit Judge. D. C. Westenhaver, District Judge.

Clerk's certificate to foregoing omitted in printing.

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UNITED STATES OF AMERICA

The Supreme Court

JOHN W. BLODGETT, Plaintiff-in-Error, vs. CHARLES HOLDEN, U. S. Collector of Internal Revenue for the Fourth Collection District of Michigan, Defendant-in-Error.	OCTOBER TERM 1926 No. 779

BRIEF FOR PLAINTIFF-IN-ERROR

This is an action brought by plaintiff-in-error to recover "gift" taxes claimed to be due and therefore exacted by defendant-in-error under Sections 319 to 324 of the United States Revenue Act of 1924, approved June 2, 1924. (R. 1)

The decision of the District Court is found in—

Blodgett vs. Holden, 11 Fed. (2nd) 180.

On Writ of Error to the United States Circuit Court of Appeals for the Sixth Circuit, the case was certified to this Court under

U. S. Jud. Code, Sec. 239.

The certificate constitutes the entire record here. (R. 1-3)

II.

The jurisdiction of this Court exists because of such certification, the Circuit Court of Appeals having power to certify and this Court jurisdiction to decide "any questions or propositions of law concerning which instructions are desired for the proper decision of the cause."

U. S. Jud. Code, Sec. 239,
Act of Feb. 13, 1925; 43 Stat. 938.

The date of the judgment in the District Court (not given in record) was February 17, 1926.

III.

STATEMENT OF CASE.

The facts are undisputed. (R. 1)

During the calendar year 1924, plaintiff in error gave away property of the value of $872,695.66 (R. 1) made up of the following items:

Charitable and public gifts, exempt from tax,	$ 21,899.64
State and Municipal bonds,	818,086.02
And other	32,110.00
	$872,695.66 (R. 1)

Of the total not exempt as charitable, etc., $843,686.02 was donated prior to the enactment of the gift tax, and $6,589.02 thereafter. (R. 1)

The tax paid and sought to be recovered was computed thus:

Total gifts,		$872,095.66	
LESS charitable gifts exempt,	$21,899.64		
LESS specific exemption allowed by law	50,000.00	71,899.64	
Balance claimed to be taxable,		$800,196.02	(R. 2)
Amount of tax paid,		$52,023.52	(R. 2)

It is apparent that the total tax was levied on a gift of securities which plaintiff in error claims the United States had no jurisdiction to tax; and also on gifts made at a time prior to the existence of any "gift" tax, and therefore on an isolated act which had been done when no tax on that act existed. (R. 1-2)

IV.

ARGUMENT.

The Court of Appeals has certified three questions (R. 2-3).

The third question is first discussed because if plaintiff in error's contention in regard to that is correct, decision of the remaining two questions is unnecessary.

1916. U. S. vs. Ginsberg, 243 U. S. 472.

FIRST

The United States has no jurisdiction to tax transfers by gift of securities issued by a state or political subdivisions thereof, for public uses, when such transfers are made inter vivos and not in contemplation of death.

A.

The certificate *shows that the entire* tax exacted and paid was on a transfer by gift of securities issued by states or political subdivisions thereof, for public uses; (R. 1, 3) that the gift was inter vivos (R. 2) and not in contemplation of death (R. 2). This undisputed (R. 1).

B.

If this tax is beyond the taxing jurisdiction of the United States, discussion as to whether it is "direct", "indirect", "supplemental" or "corrolary" is vain. No matter what it is called, it is void.

C.

It is elementary that the subject taxed must be within the jurisdiction of the taxing power.

Cooley on Taxation, 4th Ed. Sec. 57, 86, 92,
1872. State Tax on Foreign held Bonds, 15 Wall. 300, 319,
1885. Van Brocklin vs. Tenn. 117 U. S. 151, 155,
1906. Home Sav. Bank vs. Des Moines, 205 U. S. 503, 513,
1925. Frick vs. Pennsylvania, 268 U. S. 473, 489,
1926. Rhode Island etc. vs. Doughton, 9 Adv. Op. U. S. Sup. Ct. p. 355, decided March 1, 1926,
1926. Bank vs. Doughton, Adv. Op. U. S. Sup. Ct. No. 4, Dec. 15, 1926, p. 250.

In *State Tax on Foreign-held Bonds* the Court said, p. 319:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state."

In *Home Sav. Bank vs. Des Moines*, this Court said:

> "The State cannot by any form of taxation impose

any burden upon any part of the national public debt. The Constitution has conferred upon the Government power to borrow money on the credit of the United States and that power cannot *be burdened or impeded* or in any way affected by the action of any State." p. 513.

In *Van Brocklin vs. Tenn.* the Court said, page 155:

"All subjects over which the sovereign power of the state extends are objects of taxation; but those over which it does not extend are upon the soundest principles exempt from taxation. The sovereignty of a state extends to everything which exists by its own authority or is introduced by its permission."

In *Frick vs. Pennsylvania* this Court (p. 492) speaking of the distinction between a "property tax" and "one laid on the transfer of property on the death of the owner," said:

"But to impose either tax, the State must have jurisdiction over the thing that is taxed and to impose either without such jurisdiction is mere extortion and in contravention of due process of law."

Rhode Island, Etc., vs. Doughton is the case in which it was held that the State of North Carolina could not lawfully levy inheritance taxes on the stock of a New Jersey corporation (which owned property and was doing business in the State of North Carolina) because such stock was not within the jurisdiction of the state. At page 357 the Court said:

"The tax here is not upon property but upon the right of succession to property, but the principle that the subject to be taxed must be within the jurisdiction of the state applies as well in the case of a *transfer tax* as in that of a property tax. The state has no power to tax the devolution of the property of a non-resident unless it has jurisdiction of the property devolved or transferred." (Italics ours)

A.

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1925. Frick vs. Pennsylvania, 268 U. S. 473, 489.
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Bank vs. Doughton, was a case similar to the last, the transfer being by will made in North Carolina of property situated in Massachusetts and governed by the transfer laws of that State.

This Court said, p. 252:

> "A state may not subject to taxation things wholly beyond her jurisdiction or control."

D.

It is settled that the United States has no jurisdiction to tax the powers, the operations or the property of the states or their governing and assisting agencies.

1870 Collector vs. Day, 11 Wall. 113, 124,
1872 U. S. vs. R. R. Co., 17 Id. 322, 332,
1886 Van Brocklin vs. Tenn., 117 U. S. 151,
1887 Bank vs. N. Y., 121 U. S. 138, 162,
1894 Pollock vs. Trust Co., 157 U. S. 583, 586,
1896 Grether vs. Wright, 23 C. C. A. 496, 509 514, Op. by Mr. Ch. J. Taft, Note p. 515, 525, et seq.
1919 Evans vs. Gore, 253 U. S. 255.

Collector vs. Day decided that the United States had no jurisdiction to tax the salary of a state judge. The reason for so holding is based on:

McCullough vs. Maryland, 4 Wheat, 316,
Weston vs. Charleston, 2 Pet. 449,
Dobbins vs. Erie Co., 16 Pet. 435,

and is (p. 125):

> "That the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government."

U. S. vs. Railroad Company decided that the United States had no jurisdiction to tax the income derived by a state municipality from its property invested in railroad bonds. The holding is put on the following grounds (p. 327):

> "The right of the States to administer their own affairs through their legislative, executive and judicial departments in their own manner through their own agencies is conceded by the uniform decisions of this court and by the practice of the Federal government from its organization. This carries with it an exemption of those agencies and instruments from the taxing power of the Federal government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed if any interference is permitted. Hence the *beginning of such taxation* is not allowed on the one side, is not claimed on the other." (Italics ours)

In *Van Brocklin vs. Tennessee*, the Court in holding United States property exempt from taxation by the State, said (p. 155):

> "All subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend are upon the soundest principles exempt from taxation. The sovereignty of a state extends to everything which exists by its own authority or is introduced by its permission."

State bonds do not exist by U. S. authority; nor are they introduced by its permission.

In *Bank vs. New York* the Court (p. 162) said:

> "Bonds issued by the State of New York or under its authority by its public municipal bodies are means for carrying on the work of the government and are not taxable even by the United States."

In *Pollock vs. Trust Co.*, 157 U. S. 586, the Court in de-

ciding that the United States had no jurisdiction to levy income tax on income from state and municipal bonds said (p. 583):

> "Another question is directly presented by the record as to the validity of the tax levied by the act upon the income derived from municipal bonds. * * * The Constitution contemplates the independent exercise by the Nation and the State severally of their constitutional powers. As the states cannot tax the powers, the operations or the property of the United States nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of the state. A municipal corporation is the representative of the state and one of the instrumentalities of the state government. It was long ago determined that the property and revenues of municipal corporations are not subjects of Federal taxation. *Collector vs. Day*, 11 *Wall.* 124; *U. S. vs. R. R. Co.*, 17 *Wall.* 322, 332."

The Court then reviewed *Collector vs. Day*, *Dobbins vs. Commissioners*, 16 *Pet.* 435; *Van Brocklin vs. Tenn.*; *U. S. vs. R. R. Co.*, *Mercantile Co. vs. N. Y.*, 121 *U. S.* 138, 162, and after so doing, proceeds (p 585):

> "But we think the same want of power to tax the property or revenues of the states or their instrumentalities exists in relation to a tax on the income from their securities and for the same reason, and that reason is given by Chief Justice Marshall in *Weston vs. Charleston*, 2 *Pet.* 449, 468, where he said: 'The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden upon the operations of government. It may be carried to an extent which shall arrest them entirely. The tax on government stock is

thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution.' Applying this language to these municipal securities, it is obvious that the taxation on the interest therefrom would operate on the power to borrow before it is exercised, and would have a sensible influence on the contract, and that the tax in question is a tax on the power of the states and their instrumentalities to borrow money, and consequently repugnant to the Constitution."

In deciding this point the Court was unanimous.

The reasons for the rule stated are analyzed and reviewed by Mr. Ch. J. Taft in *Grether vs. Wright*, and the cases on the right of the United States to tax state agencies and securities and on the reciprocal right of the states to tax United States agencies and securities are collected in a note to that case (p. 515). This case involved the attempted taxation by Ohio of District of Columbia bonds.

The rule is restated and recognized in *Evans vs. Gore* (p. 255) in which it was held that Congress could not tax the salary (income) of United States Judges.

E.

The exclusion from the jurisdiction of the taxing powers of the Congress of state agencies and securities, is conversely applied in equal measure in excluding from the jurisdiction of the taxing powers of the states the agencies and securities of the United States.

1819 McCullough vs. Md., 4 Wheat, 316, 436,
1824 Osborn vs. Bank, 9 Wheat. 738,
1829 Weston vs. Charleston, 2 Pet. 449,
1862 Bank vs. New York, 2 Black, 620,
1864 Bank Tax Case, 2 Wall. 200,
1868 Banks vs. Mayor, 7 Wall. 16,
1868 Bank vs. Supervisors, 7 Wall. 26,

1896 Grether vs. Trust Co., 23 C. C. A. 498, and note p. 515,
1913 Farmers & Mech. Bk. vs. Minn., 232 U. S. 516,
1921 Gillespie vs. Oklahoma, 257 U. S. 501,
1922 Federal L'd. Bank vs. Crosland, 261 U. S. 374,
1926 Metcalf vs. Mitchell, Adv. Op. Feb. 1, 1926, p. 185.

F.

If there is any question of United States jurisprudence which is settled beyond controversy, it is this. The history disclosed in the cases cited shows attempts on the part of the states to tax—even to a prohibitive extent—the instrumentalities of the United States, and *vice versa*. Invariably the Supreme Court has held such attempts unconstitutional. It has applied the principle *obsta principus*.

G.

The extent to which the principle *obsta principus* has been applied is well illustrated by the decisions of this Court.

1913. Farmers Bank vs. Minn., 232 U. S. 516, 526,
1914. Choctaw vs. Harrison, 235 U. S. 292,
1920. Johnson vs. Maryland, 254 U. S. 51,
1921. Gillespie vs. Okla., 257 U. S. 501,
1922. Bank vs. Calif., 262 U. S. 366, 370,
1926. Jaybird vs. Weir, adv. Op., July 1, 1926, 675,
1872. U. S. vs. R. R. Co., 17 Wall. 322, 332, quoted *ante*, p 7,
1927. Miller vs. Milwaukee, Jan. 3, 1927, Adv. Op., p. 346.

Farmers Bank vs. Minnesota was a case where the State levied a tax on the surplus of a Savings Bank, in which surplus was included the value of certain bonds issued by municipalities originally organized under laws of the territory of Oklahoma.

It was held this was taxing a Federal agency and invalid. At page 526, this Court said:

"But we deem it entirely clear that a tax upon the exercise of the function of issuing municipal bonds is a tax upon the operations of the government and not in any sense a tax upon the property of the municipality. And to tax the bonds as property in the hands of the holders, is in the last analysis to impose a tax upon the right of the municipality to issue them."

Choctaw vs. Harrison is a case where Oklahoma levied a tax on the gross revenue derived by a corporation employed by the United States in mining coal from Indian lands pursuant to treaty obligations of the United States. It was held that the corporation was a United States agent, that the tax was an occupation or privilege tax on a governmental agent, and as such invalid.

Johnson vs. Maryland was a case where an employee of the United States Post Office was arrested, convicted and fined for driving a Post Office motor car carrying United States mail without passing a Maryland examination as to his competency, paying a Maryland tax, and obtaining a Maryland license. It was held to be an unlawful interference with a Federal agent.

Gillespie vs. Oklahoma holds that a state may not levy income taxes on income derived from operating oil wells on Indian lands under government leases, the lessee being in that case a government agent, used to perform a governmental duty to the Indians.

Bank vs. California was a case in which California undertook to escheat bank deposits intact and unclaimed for twenty years. This was held void when applied to National Banks as it impaired the efficiency of a United States agency. The Court said, p. 370:

"The approved principle of *obsta principiis* should be adhered to."

Jaybird vs. Weir holds ore taken by a lessee from restricted Indian lands cannot be taxed by a state while in possession of a governmental agent and undivided.

Miller vs. Milwaukee holds that a state may not tax income from United States bonds, even though such income is in the form of dividends distributed by a corporation which was the original recipient of the interest paid by the United States.

II.

These cases well illustrate how closely and consistently this Court has adhered to the rule that states may not in any manner by taxation interfere with United States government agencies.

The converse, that the United States may not by taxation interfere with state agencies is equally true.

That issuance of state and municipal bonds is an exercise of the powers of state agencies is a proposition too well settled to need discussion. The United States cannot tax the bonds—the subject transferred—because it has no jurisdiction to do so.

And in

1926. Rhode Island vs. Doughton, Adv. Op. Mar. 15, 1926, p. 355, 357, quoted *ante* p. 5,

this Court decided that if the *subject transferred* was not within the jurisdiction of the taxing power, the *transfer* of that subject was equally beyond the jurisdiction.

A like principle was decided in—

1925. Frick vs. Pennsylvania, quoted *ante* p. 5.
1927. Bank vs. Doughton, quoted *ante* p. 6.

Certainly—within all the decisions—the property transferred in this case was not within the taxing jurisdiction

of the United States. If, as decided in the *Frick and Doughton cases*, it is necessary to transfer tax that the taxing power have jurisdiction of both the transfer and the property transferred, then this tax is void for want of jurisdiction.

I.

It is urged that this tax may be sustained:

1. Because it does not interfere with the governmental functions of states or state agencies; or conversely, if applied by states, with governmental functions of the United States or its agencies.

2. Because this Court has sustained "transfer" taxes on both United States and State securities when the transfer was occasioned by "death" or made "in contemplation of death."

J.

The learned District Judge was of opinion:

> "That the excise tax here in question does not impair in any substantial manner the exercise of the governmental power of the States." 11 Fed. (2nd) 180.

Apparently the learned Judge thought that this "gift" tax was likely to fall on few, because few make gifts and the statutory exemption is so large that but few donors would be taxed and therefore the borrowing powers of the States and their agencies would not be impaired by *this* tax.

Such contention fails wholly to meet the case. The question is one of *kind*, not of *degree*. If the power to tax exists it may be exercised to an unlimited extent and affect every gift of state and municipal securities. If it can be

levied on donor it may be on donee and on the transferred property. If the United States can levy it on state securities the States may levy a like tax to an unlimited extent on United States securities. If such a tax may be levied on "transfers by gift" why not on "transfers by sale," and then what will become of the entire doctrine of non-interference by one government with the securities of the other?

Any tax, in any form or under any name, which *may* affect the borrowing powers of states and their governing agencies, is beyond the jurisdiction of the United States taxing power.

1829. Weston vs. Charleston, 2 Pet. 449, 468, quoted *ante* p. 8.
1913. Bank vs. Minnesota, 232 U. S. 516, 526, quoted *ante* p. 11.

Nor can a tax levied without jurisdiction be sustained as supplemental or corrolary to the Estate or Income Tax. A legal tax cannot be aided or its evasion prevented by levying an illegal one.

1925. Schlesinger vs. Wisconsin, 270 U. S. 230, 240.

Besides, the record shows affirmatively that in this case there was no attempt at evasion. (R. 2 fol. 2).

K.

That this tax must have a detrimental effect upon the market and value of state and municipal securities seems clear.

1. The tax is imposed "upon the transfer * * * by gift * * * of any property wherever situated whether made directly or indirectly."

Revenue Act 1924, Sec. 319.

2. Section 324 of the Revenue Act of 1924 is as follows:

"The tax imposed by Section 319 shall be paid by the donor on or before the fifteenth day of March and shall be assessed, collected and paid in the same manner and subject insofar as applicable, to the same provisions of law as the tax imposed by Section 301."

3. Section 301 is the Estate Tax, the provisions of which are by Section 319 made applicable to the Gift Tax.

By the provisions of the Estate Tax the entire estate is subjected to the tax and the tax becomes a lien on such estate for a period of ten years. Legatees, devisees and heirs at law are liable to pay the estate tax to the extent of the portion they receive, so that the tax follows, is a lien on and must be paid from the property transferred.

Applying this provision, as made applicable to the Gift Tax, makes the donee liable to pay the Gift Tax to the extent of the property received, subjects the donated property to a lien for the entire tax, and compels donee, if donor cannot or does not, to pay out of the value donated.

Accordingly, Treasury Regulations No. 67, Article 45, provided as follows:

"Art. 45. *Property subject to lien.*—This lien attaches to all the property of the donor, to the extent of the tax shown to be due by the return and of any deficiency tax, interest, and ad valorem penalty found to be due upon audit and review of the return. The lien also attaches to any property constituting the gift.

"Where the donor transferred or placed in trust any property by gift, a lien attaches thereto as stated in the preceding paragraph, and the donee or trustee is personally liable for the tax.

"Where the donee or trustee sells the property to a bona fide purchaser for a fair consideration in money or money's worth, the lien upon the property is divested, but there is substituted a like lien upon all the

property of the donee or trustees, except such thereof as may be sold to a bona fide purchaser for a fair consideration in money or money's worth. .

"The lien upon the entire property constituting gifts or upon the property of the donor continues for a period of 10 years after the gift, or gifts, except—

"(1) Where the tax is paid in full before the expiration of such period;

"(2) In case of the donor's death, such portion of his estate as is used for the payment of charges against the estate, and expenses of its administration, allowed by any court having jurisdiction thereof;

"(3) Such of the property constituting the gift as has been sold by the donee or trustee to a bona fide purchaser for a fair consideration in money or money's worth; or

"(4) Where the commissioner issues his certificate releasing such lien."

4. The effect of these provisions is to subject the donor to a tax for giving away state and municipal securities, which securities are outside the jurisdiction of the United States. This tax donor must pay from his remaining property or income. If he has no property or income left, or fails to pay, then the tax falls directly on the donee and the property donated, and in any event the donated property itself is subjected to a ten year lien for the amount of the tax. It is also manifest that if donee may be made secondarily liable for this tax, he may be made primarily liable, in which event the tax must fall directly on the donated property. In addition, donor is subjected to the expense and annoyance of making return of his gifts, under heavy penalty for neglect or refusal. He may even be subjected to criminal charges. And all this because of his giving away property jurisdiction to tax which is beyond the taxing power of the United States.

If this tax is upheld, then every State, municipal and Federal bond, no matter how small its amount, may be subjected to "gift" tax—state and municipal bonds by the United States and United States bonds by the various states. In such event, a series of complications would arise which would inevitably have a disastrous effect upon the market values of both classes of securities.

To go more into detail, as to the possible effect of this tax as applicable to state and municipal securities.

Donor possessed certain property *which was beyond the taxing power of the United States.* Exercising an inherent right of property, viz., the right of disposition—he gives this property to another. The consequences are:

1. A tax—which may be unlimited in amount—measured by the value of the non-taxable property given, is imposed on donor.

2. A lien is created—for ten years—on donor's remaining property, if any he has.

3. Donor must make a complicated return, possibly incur considerable expense to ascertain and establish—to the satisfaction of Treasury Agents—the value of the securities donated.

4. Until all Treasury red tape is unwound and the tax is paid all his property is under lien and subject to seizure.

5. If the gift be small, the cost of making return, satisfying the Treasury Department and obtaining release of lien, may exceed the value of the gift.

6. The donee—of this exempt property—is in like case and worse.

(1) He is liable to pay the tax, which may exceed the value of the gift.

(2) In his case the tax falls directly on the property given and as the Treasury Department asserts a personal liability against him for the *amount of the tax*, he may not only obtain nothing from the gift but may lose by its acceptance.

(3) His property is subjected to lien, distraint, etc.

(4) And he, to the expense and annoyance of satisfying the Treasury Department as to value, etc.

(5) A ten year lien imposed on state securities and their proceeds certainly will affect their value.

There is no logical distinction between taxing a "transfer by gift" and taxing a "transfer by sale". If this tax is sustained, a tax on "transfers by sale" will surely follow and the whole doctrine of the exemption of United States securities from state taxation and of State securities from United States taxation, will go to the trash pile. The consequences may be left to imagination.

Again we urge that this is not a question of the magnitude of *this* "gift" tax under *this* law; it is a question of the power to levy it at all.

I.

The statute, the material parts of which are printed in full in Appendix A, purports to be "upon the * * * transfer by gift".

Rev. Act 1924, Sec. 319

The transfer passes title. A transfer by "gift" differs in no way from a transfer by "sale" except that in the one case the consideration is, in law, regarded as "good" and in the other case as "valuable".

A tax on a transfer by sale is a tax on the thing sold.

1827. Brown vs. Maryland, 12 Wheat. 419, 444,
1875. Welton vs. Missouri, 91 U. S. 279,
1878. Cook vs. Pennsylvania, 97 U. S. 566, 573,
1898. Nichol vs. Ames, 173 U. S. 509, 521,
1900. Fairbank vs. U. S., 181 U. S. 297,
1907. Burke vs. Wells, 208 U. S. 21, 22,
1909. Western Union vs. Kansas, 216 U. S. 32,
1920. Dawson vs. Kentucky, 255 U. S. 292.

In *Brown vs. Maryland*, page 444, the Court said in relation to the license tax levied on importers of foreign goods and others selling the same by wholesale:

> "But should it be proved that a duty on the article itself would be repugnant to the constitution, it is still argued that this is not a tax upon the article but upon the person. The state, it is said, may tax occupations, and this is nothing more. It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself."

Welton vs. Missouri was this: A statute of Missouri required the payment of a license tax by persons dealing in the sale of merchandise not the growth, produce or manufacture of the State of Missouri. This tax was held to be a tax on the goods. In the opinion of the Court, pages 278, 279, Brown vs. Maryland is cited, and the Court says, page 279:

> "So, in like manner the license tax exacted by the state of Missouri from dealers in goods which are not the product or manufacture of the State, before they can be sold from place to place within the State, must be regarded as a tax upon such goods themselves."

Cook vs. Pennsylvania was this: Pennsylvania had imposed a tax on sales by auction of foreign drugs, glass, earthenware, marble works and die works, three-fourths of one per cent, the tax being on the gross amount of the proceeds of the sales.

On page 573 the Court quoted and approved Brown vs. Maryland and Welton vs. State of Missouri, and said:

> "The tax on sales made by an auctioneer is a tax on the goods sold, within the terms of this last decision, and, indeed, within all the cases cited; and when applied to foreign goods sold in the original packages of the importer before they have become incorporated into the general property of the country, the law imposing such tax is void as laying a duty on imports."

Nichol vs. Ames involved the stamp tax on sales at any exchange or board of trade or other similar place. Page 521 the Court said:

> "A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale, differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property."

In *Fairbanks vs. U. S.*, a stamp tax on a foreign bill of lading was held to be in substance and effect a tax on the articles included in the bill of lading, following the decisions in Brown vs. Maryland and similar cases.

In *Burke vs. Wells* the same rule was followed so far as goods in original packages were concerned, but it was held that after the articles imported had lost their distinctive character and had been mingled with other property, they then became subject to taxation by the states.

In *Western Union Telegraph Co. vs. Kansas*, Kansas had imposed a charter fee upon the capital stock of the

Western Union Telegraph Company, a New York corporation. This was held to be a tax on interstate commerce and not a mere franchise fee for the right to do business in the State of Kansas. Page 32, the principle decided in Brown vs. Maryland and similar cases was cited and approved as determining the question.

In *Dawson vs. Kentucky* the State of Kentucky had imposed a tax of 50c a gallon as an annual license tax on persons engaged in the business of owning and storing whiskey in bonded warehouses. This was held to be a tax on the property stored and invalid. The Court cited Thompson vs. Kreutzer and Thompson vs. McLeod, 112 Mississippi.

Cited and quoted *post*, pages 24, 25.

If a tax on transfer by sale is a tax on the property sold, why is not a tax on the transfer by gift a tax on the property given?

The learned District Judge seeks to distinguish between these two transfers because of the fact that one is for a consideration and the other is gratuitous, and he also asserts that the tax on the transfer by gift falls after the transaction is completed and title to the thing given has passed.

The distinction sought to be made has no real existence.

A tax on a sale falls after the transaction is complete and title has passed, exactly as in case of a transfer by gift.

In the matter of consideration there is no real distinction. Each is a transfer of title. Each has a consideration. One a material one, of the goods of this world. The other an immaterial one, such as the gratification of the impulses of love and affection, or the desire to promote the material welfare of those dear to us.

No logic can successfully distinguish between the practical operation and effect of these two kinds of transfers; nor does the gift tax act attempt any such distinction. On the contrary, it puts both transfers in the same class and if the sale is made for an inadequate consideration "in money or money's worth" (Sec. 320) taxes the sale and gift alike.

M.

The learned Judge and the counsel for defendant in error argue in support of this tax that inasmuch as "death" taxes based on United States, state and municipal securities have been held valid, this tax must be, and the learned Judge regards this tax as a supplement or corrolary to the United States Estate and Income Taxes intended to prevent evasion of those taxes.

Whether supplemental, corrolary, or not, if power is wanting because of lack of jurisdiction, a supplemental tax is as illegal as any other tax. This was decided in—

1926 Schlesinger vs. Wisconsin, Adv. Op. March 15, 1926, p. 301, 303.

The right to levy "death" taxes is not in any way controlling here. The law of the United States controls here, South Dakota cases relied on by the learned Judge to the contrary notwithstanding. It is United States law that a "death" tax is not a tax upon persons or upon property.

1896 U. S. vs. Perkins, 163 U. S. 625, 629, 630,
1899 Knowlton vs. Moore, 178 U. S., 47, 54, 55, 82, 83,
1900 Plumer vs. Coler, 178 U. S. 115, 131,
1906 Home Sav. Bank vs. Des Moines, 205 U. S. 516.

A "death" tax is a payment exacted by the state as a condition for allowing the heir or legatee to succeed to the

property abandoned by the dead and which property in the absence of statutory law belonged to no one and was subject to appropriation by the finder. In other words, it is a tax on a privilege conferred by the state and which privilege the state may condition as it sees fit. This privilege existing by State law, the U. S. may tax.

1897 Magoun vs. Bank, 170 U. S. 288,
1900 Plumer vs. Coler, 178 U. S. 115.

But transfer of property from the living to the living is not a matter of privilege. It is a common right guaranteed by all our constitutions.

U. S. Const. Art. IV, Sec. 2, Cl. 1,
1870 Ward vs. Maryland, 12 Wall. 430,
1917 Buchanan vs. Warley, 245 U. S. 60,
12 C. J. p. 945, Sec. 459,
1887 Powell vs. Penn. 127 U. S. 678, 684,
1916 Thompson vs. Kreutzer, 112 Miss. 165,
1916 Thompson vs. McLeod, 112 Miss. 383.

The last two cases were cited with approval in Dawson vs. Ky., 255 U. S. 292.

1898 Chicago vs. Collins, 175 Ill. 445,
1904 Montgomery vs. Kelly, 142 Ala. 552, 556,
1911 Opinion to House of Representatives, 208 Mass. 616, 619,
1889 W. Va. vs. Goodwill, 33 W. Va. 183.

In *Ward vs. Maryland*, the question was as to the right of the State of Maryland to require traders resident within the state to take out licenses and pay therefor certain sums, and made it a penal offense for any person not a permanent resident to sell, offer for sale or expose for sale any goods, wares or merchandise not the product of Maryland without first paying a license therefor. This was held to be a discriminating tax upon non-resident traders and repugnant to the Constitution and void.

At page 430, the Court, in speaking of the privileges and immunities guaranteed by the Constitution, said:

> "Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade or business without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the state; and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens."

In *Powell vs. Pa.*, page 684, the defendant contended that the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property is an essential part of his rights of liberty and property as guaranteed by the Fourteenth Amendment. It was said, page 684:

> "The Court assents to this general proposition as embodying a sound principle of constitutional law."

In *Buchanan vs. Warley*, the question was as to the validity of an ordinance forbidding the owner of property to sell the same to a colored person. The Court said, page 74:

> "The Fourteenth Amendment protects life, liberty and property from invasion by the states without due process of law. Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The Constitution protects these essential attributes of property. *Holden vs. Hardy*, 169 *U. S.* 366, 391. Property consists of the free use, enjoyment and disposal of a person's acquisitions without control or, diminution, save by the law of the land."

Thompson vs. Kreutzer was this: A Mississippi statute levied "an annual privilege tax or occupation fee * * * upon each person * * * pursuing the business of buying,

owning or holding more than one thousand acres of timber land."

On a bill to enjoin the collection of this tax, the Court held that it was a "property" and not a "privilege" tax and unconstitutional. The state claimed it was a "tax upon the privilege of ownership."

The Court said, page 167:

> "Ownership is not a privilege conferred by government but is one of the rights which governments were organized to protect."
>
> "A tax on a thing is a tax on all its essential attributes; and a tax on an essential attribute of a thing is a tax on the thing itself. So that a tax on a thing owned is necessarily a tax on the right of ownership thereof; and a tax on the right ownership of a thing is necessarily a tax on the thing itself. No definition of property can be framed which does not include the right of ownership. Consequently no tax can be imposed on the right of ownership which is not also a tax on property."

1916 *Thompson vs. McLeod*, 112 *Miss.* 383. A Mississippi statute levied "an annual privilege tax or occupation fee on all persons * * * pursuing the business of extracting turpentine from standing trees."

On a bill to enjoin the collection of the tax, Held, a property tax and invalid. The Court said, page 388:

> "This act strikes down the inherent right of the property owner to lay hand upon his own property. Every owner of a pine tree enjoys the same natural right to extract gum from the tree as the owner of a vineyard has to pluck his own grapes. It would be the same thing to require a privilege tax as a precedent to the right of the owner to pull the ripe pecans from his pecan orchard or to enjoy a drink of pure water from the cool spring of the old homestead."

These two cases are cited with approval in *Dawson vs. Kentucky*, 255 *U. S.* 292.

1898 *Chicago vs. Collins*, 175 *Ill.* 445, is authority to the effect that a right free and open to all cannot be made the subject of a license or privilege tax.

1904 *Montgomery vs. Kelly*, 142 *Ala.* 552, 556, is to the same effect.

1911 *Opinion to House of Representatives*, 208 *Mass.* 616, 619, holds that Massachusetts cannot levy "excises" on "mere ownership" of property.

1889 *West Va. vs. Goodwill*, 33 *W. Va.* 183, is authority to the effect that the right to use and dispose of property is of common right and is not a "privilege."

N.

From the beginning of our Government under the Constitution, this Court has invariably protected United States agencies and securities against the effort of the States to tax them, and State agencies and securities against similar effort by the United States.

The rights of the United States and of the States in this regard are equal. If this tax is sustained, every gift of State securities, no matter how small, may be taxed by the United States and every gift of United States securities may be taxed by the States. Tax liens may be fastened on every such security, the right of disposition impaired and their marketability affected. The functioning of the United States and the States will be "embarrassed or destroyed".

1919. Evans vs. Gore, 253 U. S. 256.
1874. Loan Assn. vs. Topeka, 20 Wall. 663, 664.

The mere fact that a lien is placed in favor of the United States on the property donated—

Rev. Act. 1924, Sec. 324, 315,
Treas. Reg. No. 67, Art. 45,
Rev. Stat. Sec. 3186, as amended Mar. 1, 1879, Chap. 125, Sec. 3,
Act. Mar. 4, 1923, Chap. 166,

certainly amounts to an "embarrassment," and may amount to destruction.

SECOND.

A.

This "gift" tax is an unapportioned "direct" tax and therefore in contravention of—

U. S. Const. Art. I Clause 3, Sec. 2, and
Clause 4, Sec. 9 (R. 2, Ques. (1).)

and for that reason void.

B.

That the tax is "unapportioned" is undisputedly shown by the act itself.

See Appendix.

If, therefore, the tax is "direct" within the meaning of the Constitution, it must be declared void.

C.

In considering this question it matters not that the statute calls the "gift" tax a tax "upon the transfer * * * by gift." Substance, not form, is controlling. The Court will look behind the form and determine the substance.

1827 Brown vs. Maryland, 12 Wheat, 419, 444,
1872 State Freight Tax, 15 Wall. 232, 272,
1875 Welton vs. Missouri, 91 U. S. 275, 278,
1886 Fargo vs. Michigan, 121 U. S. 230,

1894 Postal vs. Adams, 155 U. S. 688, 698,
1898 Nichol vs. Ames, 173 U. S. 509, 515, 516,
1910 Flint vs. Stone-Tracy Co., 220 U. S. 107,
1915 Kansas City vs. Botkin, 240 U. S. 227, 231,
1920 Dawson vs. Ky. Distilleries Co., 255 U. S. 288, 292,
1921 U. S. vs. Phellis, 257 U. S. 168.

In *Brown vs. Maryland*, the State of Maryland had imposed on all importers of foreign goods by the bale or package, and on other persons selling the same by wholesale, bale or package, a license tax of $50.00. This was held to be an infringement of the Constitutional provision that "no state shall, without the consent of Congress, lay any impost or duty on imports or exports except what may be absolutely necessary for executing its inspection laws," and also an infringement of the power of Congress to regulate commerce between the states and with foreign nations. The Court, speaking by Mr. Chief Justice Marshall, page 444, said:

> "But should it be proved that a duty on the article itself would be repugnant to the constitution, it is still argued that this is not a tax upon the article, but on the person. The state, it is said, may tax occupations, and this is nothing more. It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition, which is general, as if it were confined to a particular mode of doing the particular thing. All must perceive that a tax on the sale of an article imported only for sale, is a tax on the article itself. It is true, the state may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business."

The tax was held invalid.

In the case of the *State Freight Tax*, Mr. Justice Strong, in the opinion of the Court, said, page 272:

"It has repeatedly been held that the constitutionality or unconstitutionality of a state tax is to be determined not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid. This was decided in the cases of Bank of Commerce vs. New York City, the Bank Tax Case, Society for Savings vs. Coite, and Provident Bank vs. Massachusetts."

In *Welton vs. State of Missouri*, the State of Missouri had imposed a license tax upon persons who dealt in the sale of goods, wares and merchandise not the growth, produce or manufacture of the state. It was sought to support the tax by calling it a tax upon the calling or profession. The Court held that a license tax required for the sale of goods was in fact a tax upon the goods themselves no matter what it was called.

In the case of *Fargo vs. Michigan*, the State of Michigan had levied a tax upon the gross receipts of railroads as a tax upon the business transacted within its borders. It was held that the tax was a tax on interstate commerce, although limited by its terms to a tax on business transacted within the State of Michigan.

In *Postal vs. Adams*, the State of Mississippi imposed upon the Postal Telegraph Company certain taxes which the Telegraph Company claimed were burdens on interstate commerce. The Court examined the tax and determined that it was a tax upon the property of the Telegraph Company within the jurisdiction of the State of Mississippi and not a tax upon interstate commerce, and on page 698, in the opinion of the Court, they say in determining this question:

"The substance and not the shadow determines the validity of the exercise of the power."

In *Nichol vs. Ames*, the question arose over the Act of

Congress of June 13, 1908, taxing sales of property on boards of trade or stock exchanges. This was contested as a direct tax. On page 516, the Court said:

> "Taxation is eminently practical and is, in fact, brought to every man's door, and for the purpose of deciding upon its validity the tax should be regarded in its actual, practical results rather than with reference to those theoretical or abstract ideas whose correctness is a subject of dispute and contradiction among those who are experts in the science of political economy."

In *Flint vs. Stone Tracy Company*, the law involved was the Corporation Tax of 1909, which was styled in the Act itself an excise tax. The Court said, page 145:

> "While the mere declaration contained in a statute that it shall be regarded as a tax of a particular character does not make it such if it is apparent that it cannot be so designated consistently with the meaning and effect of the act, nevertheless, the declaration of the law making power is entitled to much weight."

In *Kansas City, Etc., vs. Botkin*, Kansas had imposed on domestic corporations an annual franchise fee, which was claimed to burden interstate commerce. Held it did not.

Page 235, the Court said:

> "Undoubtedly a tax may be in form a privilege tax and yet in substance may be a tax on property."

Page 231:

> "Decision must regard the substance of the exaction —its operation and effect as enforced—and cannot depend upon the manner in which the taxing scheme has been characterized."

In *Dawson vs. Ky. Distilleries Co.*, Kentucky had levied on every person engaged "in the business of owning and storing" whiskey an "annual license tax" of 50c per gallon

on all whiskey withdrawn or transferred in bond from Kentucky to another state.

This was attacked as a "property" tax and unconstitutional under the Kentucky Constitution.

The Court said, page 292:

> "The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents."

and held it to be a property tax.

U. S. vs. Phellis arose under the income tax law of 1913.

Page 168, the Court said:

> "We recognize the importance of regarding matters of substance and disregarding forms in applying the provisions of the Sixteenth Amendment and income tax laws enacted thereunder. In a number of cases * * * we have under varying conditions followed the rule."

D.

As the word "direct" is used with reference to taxation, in the Constitution of the United States, there is no precise definition authorized by this Court, which will differentiate in all cases between a "direct" tax and a "duty impost or excise," which are "indirect."

In *Nichol vs. Ames*, 173 *U. S.* 509, 516, the Court said after commenting upon the constitutional provisions as to "direct" and other taxes:

> "In deciding upon the validity of a tax with reference to these requirements, no microscopic examination as to the purely economic or theoretical nature of the tax should be indulged in for the purpose of placing it in a category which would invalidate the tax. As a mere abstract, scientific or economical problem, a par-

ticular tax might possibly be regarded as a direct tax, when as a practical matter pertaining to the actual operation of the tax, it might quite plainly appear to be indirect. Under such circumstances, and while varying and disputable theories might be indulged as to the real nature of the tax, the court would not be justified, for the purpose of invalidating the tax, in placing it in a class different from that to which its practical results would consign it."

In *Knowlton vs. Moore*, 178 *U. S.* 82, 83, the question was as to the validity of taxation by the United States of inheritances, and it was claimed that a tax on inheritances was a direct tax. The opinion quotes with approval the foregoing quotation from Nichol vs. Ames.

In *Thomas vs. U. S.*, 192 *U. S.* 363, the question arose over the law requiring revenue stamps upon memorandum of sale of stock. The opinion of the Court says:

"There is no occasion to attempt to confine the words, duties, imposts and excises to the limits of precise definition. We think that they were used comprehensively to cover customs and excise duties imposed upon importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like."

In *Trust Co. vs. Eisner*, 256 *U. S.* 345, 349, the question arose over the estate tax. In considering this question, the Court held that the matter had been disposed of by the decision in Knowlton vs. Moore, saying in regard to the estate tax being a direct tax:

"But that matter also is disposed of by Knowlton vs. Moore, not by an attempt to make some scientific distinction, which would be at least difficult, but on an interpretation of language by its traditional use—on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax; 'has ever been treated as a duty or excise

because of the particular occasion which gives rise to its levy'. 178 U. S. 81-83. Upon this point a page of history is worth a volume of logic."

E.

Notwithstanding the refusal of the Court to formulate any precise definition of the difference between "direct" and other taxes, such differences are known to the Constitation of the United States.

DIRECT TAXES.

(a) Poll or capitation taxes are direct taxes under the Constitution itself.

Article I, Section 9, Clause 4,
Scholey vs. Rew, 23 Wall. 331.

(b) Tax on slaves, which were personal property, in some states and realty in others.

1880 Springer vs. U. S. 102 U. S. 586.

(c) Tax on realty.

Idem.

(d) Tax on the income from realty.

(e) Tax on personalty.

(f) Tax on income from personalty.

1894 Pollock vs. Farmers Loan & Trust Co., 157 U. S. 429,
s.c. 158 U. S. 601.

(g) Tax on a stock dividend.

1920 Eisner vs. Macomber, 252 U. S. 189,
1918 Towne vs. Eisner, 245 U. S. 418.

In the case of the poll tax, the tax falls on the taxpayer by reason of his existence and is involuntary. In the other

cases the tax falls on the taxpayer by reason of the ownership of property and is likewise involuntary so long as the party continues to own the property, and as no one can exist without the ownership of property, these taxes also may be said to be involuntary.

INDIRECT TAXES.

(a) Tax on carriages for the conveyance of persons.
Hylton vs. U. S., 3 Dallas 171.

(b) Taxes on special privileges created by law.
Ins. Co. vs. Soule, 7 Wall. 433,
Venzie Bank vs. Fenno, 8 Wall. 533,
Nat'l Bank vs. U. S. 101 U. S. 1.

(c) Tax on the privilege of succeeding to the ownership of property abandoned by deceased persons.
Scholey vs. Rew, 23 Wall. 331,
Knowlton vs. Moore, 178 U. S. 41,
Trust Co. vs. Eisner, 256 U. S. 345.

(d) Tax on trade exchange sales.
Thomas vs. U. S., 192 U. S. 363.

(e) Tax on corporate franchises.
Flint vs. Stone-Tracy Co., 220 U. S. 107.

Such indirect taxes fall by reason of the voluntary exercise of the privilege.

(f) Taxes on tobacco, liquors, etc.
Patton vs. Brady, 184 U. S. 608.

(g) Taxes on foods.
McCray vs. U. S., 195 U. S. 27.

(h) Taxes on luxuries.
Billings vs. U. S., 232 U. S. 261.

All which were recognized "excises" or "duties" at the time of the adoption of the Constitution.

F.

Under the circumstances indicated *ante* D. E, the line between "direct" and "indirect" taxes, as those terms are used, must be found from the cases decided.

If we study those cases we find a principle common to all, and also common to the economic definitions.

1. A tax is "direct" when its incidence is determined by the existence of the taxpayer, the incidence of the tax is involuntary, or independent of the volition of the taxpayer, and unavoidable. In this class are poll taxes.

2. A tax is "direct" when imposed by reason of the ownership of property, and as no one can exist without ownership of property, this tax is also involuntary in its incidence and unavoidable. In this class are general taxes on property and the rights of ownership thereof.

3. A tax is "indirect" when its real incidence may be avoided by refusal or neglect to purchase the taxed article or to do the act or to exercise the privilege taxed, or where the original taxpayer indemnifies himself by collecting the tax from some other person whose assumption of the indemnifying payment is voluntary. In other words, liability to pay an indirect tax is created by the voluntary act of the taxpayer.

G.

The tax on gifts when levied retroactively—as in this case—falls within not only the economic definitions of "direct" taxes, but within the principles on which this Court has decided that taxes are or are not "direct".

(a) Economic definitions:

Smith's "Wealth of Nations" distinguishes between direct and indirect taxes in that direct taxes are assessed

on persons according to property or income, and indirect taxes on expenses of consumption. Smith's work was extant at the time of the adoption of the Constitution.

Turgot, the French author, whose work on taxation was published in 1764, says there are but three possible taxes—direct upon the funds, direct upon the person, and indirect, or that which is placed upon consumption.

Leroy Beaulieu in his treatise on the Science of Finance, defines direct taxes as those "which the legislature intends should be paid at once and immediately by him who bears their burden. They strike at once his fortune or his revenue and every intermediary between him and the treasury is suppressed."

McCullough in "Principles of Taxation" says a tax is direct when it is immediately taken from property, and indirect when it is taken from its owners by making them pay for liberty to use certain articles or exercise certain privileges.

D. A. Wells, in his "Theory and Practice of Taxation", says, page 341:

> "In a general sense the term 'direct' is applied to those taxes which are demanded from the particular persons who it is intended or desired shall pay them; and 'indirect' to those which are demanded from a person with the expectation and intention that he shall indemnify himself for payment of the same at the expense of some other person. There is, furthermore, marked distinction, founded on sound philosophy, between a direct and indirect tax, which, if concisely expressed, will constitute two unimpeachable definitions. Thus an indirect tax, whoever may first advance it, is paid voluntarily and primarily (in the sense of ultimately) by the consumer of the taxed article. On the other hand, a direct tax has always in it an element of compulsion; not necessarily on the person who ad-

vances the tax in block, but on the person who is compelled to use or consume the taxed property or its product. For example, there is nothing compulsory or unequal in an ordinary license tax. If the license is high, no one is compelled to engage in a business covered by its legal requirements; and few persons will until the average profits of the taxed business by the regular laws of competition finally reach the average profits of other like employments or investments. A tax on commodities like whiskey, tobacco, fermented liquors, oleomargarine, playing cards, dice and the like, can always be avoided as a primary tax, or can be paid at discretion. But there is nothing voluntary in the payment of a tax upon all real or personal property, or on the income of such property. Human beings cannot subsist without some forms of personal property, and therefore a tax upon all personal property or its income is of necessity compulsory and not voluntary. Any general assessments of personal property on or by reason of its income, as well as assessments on real estate, are unavoidable in their nature, and therefore, from a philosophic or economic point of view, are typically direct taxes."

In the light of these economic definitions of "direct" taxes, let us consider the tax levied in this case.

Prior to the enactment of the law, donor had a vested right to give away his property. Donee had a vested right to accept the gift. The gift was made. No law then existed which subjected the transaction to taxation. As a result donor parted with his property beyond recall. Donee received a vested title. Thereafter comes the "gift" tax, by which—

(1) Donor is made, by legislative fiat, personally liable for upwards of $52,000.

(2) All his remaining property is subjected to a first lien for that amount.

(3) All his remaining property is subjected to seizure and sale (distraint) to compel him to pay.

(4) All this without knowledge or voluntary action on his part and without possibility of his recovering the tax from donee. He must pay and can in no way avoid it.

(5) And under Treasury Regulation No. 67, Article 45, (quoted *ante* p. 15-16) the same consequences have fallen on the donees.

If this is not a "direct" tax, then there is no such thing. If the Congress may levy this tax, it may levy a like tax on every gift ever made back to the adoption of the Constitution and exact payment regardless of the "direct" tax provisions of the Constitution.

(b) This tax has all the earmarks of a "direct" tax within the tests held by the Supreme Court to be those of "direct" taxes.

Pollock vs. Farmers Loan & Trust Co., 157 U. S. 429, 558,
Pollock vs. Farmers Loan & Trust Co., 158 U. S. 627,
South Carolina vs. U. S., 39 C. Cl. 527,
South Carolina vs. U. S., affirmed, 199 U. S. 437,
Thomas vs. U. S., 192 U. S. 363,
Flint vs. Stone Tracy 220 U. S. 105, 151.

In *Pollock vs. Farmers Loan & Trust Company*, the opinion of the Court, page 558, says:

> "Ordinarily all taxes paid primarily by persons who can shift the burden upon someone else or *who are under no legal compulsion to pay them*, are considered indirect taxes; but a tax upon property holders in respect to their estates, whether real or personal, or on the income yielded by such estates, and *the payment of which cannot be avoided*, are direct taxes. Nevertheless, it may be admitted that although this defini-

tion of direct taxes is prima facie correct and to be applied in the consideration of the question before us, yet, that the constitution may bear a different meaning and that such different meaning must be recognized." (italics ours)

In the opinion in the same case, on rehearing, page 627, the Court said:

"Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the constitution, taken in its plain and obvious sense and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership and *with no possible means of escape from payment*, as belonging to a totally different class from that which includes the property from which the income proceeds? There can be but one answer, unless constitutional restriction is to be treated as utterly illusory and futile and the objects of its framers defeated. We find it impossible to hold that a fundamental requisition deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinction between that which gives value to the property and the property itself. (italics ours)

In *South Carolina vs. U. S.*, 39 *Court of Claims*, 257, it is said:

"A tax is obligatory; from it there is no escape. An excise is voluntary; the purchaser, who would pay it, cannot be compelled to purchase."

This case was affirmed. 199 U. S. 437.

Thomas vs. U. S. involved stamp tax on memoranda of sale of stocks sold on the New York Exchange. The Court said, page 371:

"The sale of stocks is a particular business trans-

action in the exercise of the privilege afforded by the laws in respect to corporations, of disposing of property in the form of certificates. The stamp tax is contingent on the happening of the event of sale, and *the element of absolute and unavoidable demand is lacking.* As such it falls, as stamp taxes ordinarily do, within the second class of forms of taxation." (italics ours)

In *Flint vs. Stone-Tracy Co.*, 220 U. S. 151, 152, the above quoted language from the Thomas case is cited and approved.

The element of choice or voluntary action by the taxpayer is totally lacking, so far as this case is concerned. The taxpayer had no choice. The tax comes within the definition of "direct" as laid down by the cases.

II.

A capitation or poll tax, is a tax upon the person without any reference to his property, business or employment.

9 C. J., p. 1281,
Hylton vs. U. S., 3 Dall. 171, 175,
Head Money Cases, 18 F. R. 135, 139,
Leedy vs. Bourbon, 12 Ind. 486,
Murchison vs. McNeill, 60 N. C. 217, 223,
Gardner vs. Hall, 61 N. C. 21, 22.

By the Constitution itself and by the decision of this Court, such a tax is a "direct" tax.

Const. Art. 1, Sec. 9, Clause 4,
Scholey vs. Rew, 23 Wall, 331.

Evidently such a tax is regarded as "direct" because it falls on the person of the taxpayer. It has no voluntary feature. No act of the taxpayer causes the incidence of the tax and no act of his can free him from it. Exactly the same is true of the retroactive tax in question. It falls on the person of the donor (taxpayer). The volition of the

donor has nothing to do with it, and he can in no way avoid payment.

If a capitation tax is a "direct" tax, any tax which operates in the same way and produces the same results on the person and property of the taxpayer must necessarily fall into the same class.

In this connection and as illustrating the "direct" character of this tax, attention is called to the fact that by the "Gift" tax sections of the Revenue law in question the tax falls directly on donor when the property given is beyond the territorial jurisdiction of the United States and the act of giving, i. e., the transfer itself, takes place outside of such territorial jurisdiction.

> "A tax • • • is hereby imposed upon the transfer by a resident by gift • • • of any property wherever situated, whether made directly or indirectly."
>
> Sec. 319, Revenue Act 1924.

Manifestly in such case the sole thing within the jurisdiction of the United States is the person of the resident donor, and the tax must fall directly on his person since the United States can exercise its power on nothing else. In such a case the tax falls because of residence and nothing else, and is exactly like a poll tax.

I.

As illustrating the "direct" character of this tax, attention is called to the apparent necessity of the tax being either "direct" or "indirect" in its entirety. It cannot be "direct" as to John Doe and "indirect" as to Richard Roe as far as it applies to "gifts" made after its enactment.

The tax is imposed "upon the transfer by a resident by gift • • • of any property wherever situated • • • and upon

the transfer by a non-resident by gift * * * of any property situated within the United States." Rev. Act. 1924, Sec. 319.

In the case of a resident who transfers property in Canada or any foreign country, manifestly the sole thing within the jurisdiction of the United States is the person of the taxpayer and the tax is "direct" upon that person. It can be nothing else, for there is nothing else the United States can tax.

In the case of a non-resident who transfers property within the United States, the sole thing within the jurisdiction of the United States is the property transferred and the tax is "direct" upon that property. It can be nothing else, for there is nothing else the United States can tax.

Can a tax which is manifestly "direct" as to one person be an "indirect" tax as to another?

J.

Taxes on realty and its income, and personalty and its income, are "direct" taxes.

1880 Springer vs. U. S. 102 U. S. 586,
1894 Pollock vs. Farmers L. & T. Co., 157 U. S. 429,
1894 Pollock vs. Farmers L. & T. Co., 158 U. S. 601,
1920 Eisner vs. Macomber, 252 U. S. 189

The Sixteenth Amendment permits "direct" income taxes to be levied without apportionment but makes no change as to other "direct" taxes.

1920 Eisner vs. Macomber, 252 U. S. 206

The "Gift" tax is not an "income" tax and cannot be sustained by the Sixteenth Amendment. If the "Gift" tax is "direct", it necessarily is void for want of apportionment.

We claim the "Gift" tax (retroactive as in this case) falls within the category of "direct" taxes, under the principles decided in the Pollock case and those which followed it.

Those cases held that taxing the income derived from personalty or realty was in reality taxing the property from which the income was derived. That in effect was saying that to tax the "use" by which "income" was derived from property, was to tax the property itself, since no "income" can be derived from property unless the property is "used".

Property value, in fact property itself, is not the mere right, independent of the incidents which go with it (possession, use and disposition). Mere possession is valueless, unaccompanied by the right of use and disposition, and the right of use without the right of disposition would in most cases render the property valueless. In fact, property itself has been defined as the right of possession, use and disposition.

Chicago vs. Englewood, 115 Ill., 375, 385,
Easton vs. Boston, 51 N. H. 504, 511,
Exp. Law, 15 F. C. 8126,
Dixon vs. People, 168 Ill. 179, 190,
Dixon vs. People, 39 L. R. A. 116,
See cases cited *ante*, p. 23-26.

If taxation of the incident of property known as "use" is a taxation of the property itself, and therefore a "direct" tax, can there be any distinction between taxing the "use" and the "disposition", both being "incidents" of property and both being necessary to give value to the property?

See Pollock vs. Trust Co., *ante*.

It has often been held that a tax on the transfer by sale of property was a tax on the property sold.

See *ante*, p. 19.

If a tax on transfer by sale is a tax on the property sold, why is not a tax on the transfer by gift a tax on the property given?

Regarded as taxation of the right of "use" or of the right of "disposition" the "Gift" tax is equally a tax on property, and therefore a direct tax and being unapportioned, is void.

K.

The "Gift" tax does not come within the recognized limits of any definition of an "indirect" tax.

It cannot be shifted from donor and ultimately paid by some one else, as the *economic* definition would require.

In this case the voluntary incurring of the tax, which under the Pollock case is a necessary element of an "indirect" tax is absent.

On the argument of *Pollock vs. Farmers Loan & Trust Company*, 157 *U. S.* 491, Mr. Justice Brown defined a distinction between direct and indirect taxes thus:

> "Direct taxes are paid by the taxpayer both immediately and ultimately, while indirect taxes are paid immediately by the taxpayer and ultimately by somebody else."

Mr. Justice Field's definition in his concurring opinion, page 588, was:

> "Direct taxes in a general and large sense, may be described as taxes derived immediately from the person or from real or personal property without any recourse therefrom to other sources for reimbursement."

The definition given by Mr. Chief Justice Fuller in the opinion of the Court introduces the voluntary principle. Page 558, he said:

> "Ordinarily all taxes paid primarily by persons who can shift the burden upon someone else or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect to their estates, whether real or personal, or on the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes."

It will be noted in the case at bar that both the possibility of shifting and the element of voluntary action on the part of the taxpayer causing the incidence of the tax are totally lacking.

In *Thomas vs. U. S.*, 192 *U. S.* 363, 370, the Court said with reference to indirect taxes, page 370:

> "There is no occasion to attempt to confine the words 'duties, imposts and excises' to the limits of precise definition. We think that they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations, and the like. Taxes of this sort have repeatedly been sustained by this Court and distinguished from direct taxes under the Constitution."

Certainly a "gift" is not an "importation", a "consumption", a "manufacture or sale of commodities", a "vocation" or an "occupation". It cannot be a "privilege" to exercise the common vested right of disposition of owned property.

> Thompson vs. McLeod, 112 Miss. 383,
> Thompson vs. Kreutzer, Id. 165.

It certainly is not a "particular business transaction." It is not "business" at all. It is an isolated act of generosity. "Business" when subjected to taxation means business in the trade or commercial sense carried on for profit.

"The term 'business' as used in a law imposing a license tax on businesses, professions and callings, ordinarily means a business in the trade or commercial sense one carried on with a view to profit or livelihood."

1909 Cuzner vs. Cal. Club, 155 Cal. 303, 311,
1918 Reynolds vs. Lexington, 181 Ky. 503, 505,
1919 Texas Co. vs. Amos, 77 Fla. 327,
1910 Flint vs. Stone-Tracy Co., 220 U. S. 171.

"The employment or occupation in which a person is engaged to procure a living."

Goddard vs. Chafee, 2 Allen 395,
See *Webster's* Dict., Tit. Business,
1913 Shed vs. State, 155 S. W. 524,
1861 People vs. Commissioners, 23 N. Y. 242.

I.

The tax in question, no matter by what name it is called, is a tax upon one of the elements or incidents of the ownership of property. These elements are (1) possession, (2) use, (3) disposition, or we may say disposition is use. These are the rights which make property valuable. To tax these rights is to tax the property of which these rights are incidents.

That which gives property value is the right to employ and dispose of it. Deprive the owner of these rights and you have deprived him of the property itself.

1796 Hylton vs. U. S., 3 Dallas, 171.

1895 *Pollock vs. Trust Co.*, 157 *U. S.* 589. The concurring opinion of Mr. Justice Field in this case calls attention to the long line of cases holding that the right to the use of property is really the property itself.

In the case first cited, Mr. Justice Patterson, *arguendo*, says:

"Land independently of its produce is of no value." Page 177.

In *Pollock vs. Trust Co., on rehearing*, 158 *U. S.* 628, Mr. Chief Justice Fuller in delivering the opinion of the Court, said:

> "We find it impossible to hold that a fundamental requisition * * * can be refined away by forced distinctions between that which gives value to property and the property itself."

1887 *Powell vs. Pa.*, 127 *U. S.* 678, 684. The Court said, page 684:

> "The main proposition advanced by defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property is an essential part of his rights of liberty and property as guaranteed by the Fourteenth Amendment. The Court assents to this general proposition as embodying a sound principal of constitutional law."

1896 *Allgeyer vs. Louisiana*, 165 *U. S.* 578, 590, approved this.

1917 *Buchanan vs. Warley*, 245 *U. S.* 60. In this case the Court (in holding an ordinance prohibiting a negro from residing in any city block in which a majority of the houses were occupied by whites invalid) said, page 74:

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The Constitution protects these essential attributes of property."

1856 *Wynehamer vs. The People*, 13 *N. Y.* 378, 396. The Court in defining property, said, page 396:

> "Nor can I find any definition of property which does not include the power of disposition and sale, as well as the right of private use and enjoyment."

1888 *Kuhn vs. Detroit*, 70 *Mich.* 534, held "that property does not consist merely of the title and possession. It includes the right to make any legal use of it and the right * * * to sell and transfer it."

1874 *Grand Rapids Boom Co. vs. Jarvis*, 30 *Mich.* 320, 321.

Mr. Justice Christiancy, speaking for the Court, said:

> "Of what does property practically consist but of the incidents which the law has recognized as attached to the title or right of property? Is not the idea of property in or title to the lands, apart from and stripped of all its incidents, a purely metaphysical abstraction, as immaterial and useless to the owner as 'the stuff that dreams are made of'? Is it not a much less injury to him, if it can injure him at all, to deprive him of this abstraction than of the incidents of property, which alone render it practically valuable to him? Among the incidents of property in land, or anything else, is not the right to enjoy its beneficial use and so far control it as to exclude others from that use, the most beneficial, the one most real and practical idea of property, of which it is a much greater wrong to deprive a man than of the mere abstract idea of property without incidents? This use or the right to control it with reference to its use constitutes in fact all that is beneficial in ownership except the right to dispose of it, and this latter right or incident would be rendered barren and worthless stripped of the right to the use. Property does not consist merely of the right to the ultimate particles of matter of which it may be composed * * * but of those properties of matter which can be rendered manifest to our senses and made to contribute to our wants or our enjoyment."

If property includes the right of disposition as this Court says it does, it must follow that a tax on the right of disposition is a tax on the property disposed of.

THIRD.

The tax in question, so far as it affects the plaintiff in this case, has deprived him of property without compensation and without due process of law contrary to the Fifth Amendment.

A.

It is to be remembered that so far as plaintiff is concerned, this total tax is retroactive. The total amount of the gifts, over and above the statutory exemption, was donated prior to the enactment of the Gift Tax Law (R. 1). At the time when these gifts were made the donor had no knowledge that any such tax law would be enacted. He had a vested right secured to him by the Constitution of the United States to give away his property without incurring any such liability for so doing. The donee had a vested right to acquire the donated property, without this liability. After the acts in question had taken place, the Congress by a retroactive tax law imposed a personal liability for a large sum of money which did not exist at the time of the transactions in question. It also fastened upon the remaining property of the donor, on the donated property, and on the property of the donee, a lien for the amount of the tax, and subjected the property of donor and donee to summary process of distraint. This the Congress did by legislative fiat without the possibility of the donor or donee having any hearing or election in the premises.

The Congress has in effect, *taxed an isolated act committed before the taxing act was enacted.*

B.

For plaintiff-in-error it is claimed:

1. That the tax in question being levied on a gift of

State securities, was beyond the taxing jurisdiction of the Congress, and hence was not due process.

2. That the tax being direct and unapportioned, was beyond the jurisdiction of the taxing power of the Congress, and hence was not due process.

3. That by reason of its being levied on a single act which occurred prior to the enactment of the tax law, this tax in this case amounts to a judgment by the Congress pronounced without notice or hearing and hence is not due process.

C.

It is not claimed that the Fifth Amendment is a limitation on the taxing power of the Congress. It is, however, claimed that it forbids the Congress from acting without jurisdiction or arbitrarily.

It has been held that the Fifth and Tenth Amendments qualify as far as applicable all the provisions of the Constitution but do not take away the grant of power to tax;

1903 McCray vs. U. S., 195 U. S. 27, 61,

and

1924 *Barclay vs. Edwards*, 267 U. S. 442, 450—the last decision on the subject of the applicability of the Fifth Amendment to the United States tax laws—states the rule thus:

> "The power of Congress in levying taxes is very wide and where a classification of taxpayers is reasonable and not merely arbitrary and capricious, the Fifth Amendment cannot apply." (p. 450)

1926 Schlesinger vs. Wis., 270 U. S. 230.

See also

1917 Hammer vs. Dagenhart, 247 U. S. 251,
1921 Child Labor Case, 259 Id. 20,
1921 Hill vs. Wallace, 259 Id. 44.

Taking the cases together, the rule as to the applicability of the Fifth Amendment to questions of taxation appears to be:

1. It limits capricious and unreasonable classifications for purposes of taxation.

2. If the Congress has power to levy a tax and does so, the method used is "due process" and the tax is not a "taking without compensation."

3. As a corollary, it follows that if the Congress has not the power to levy a given tax, then its doing so is not "due process", etc.

D.

It is claimed by defendant-in-error that the Congress has unlimited power to levy taxes retroactively. If that contention is correct the Congress has power to levy taxes on every gift ever made back to the beginning of government under the Constitution.

The cases cited in support of this contention when the *dicta* therein are limited to the facts under consideration fail to support the contention. No case decided in this Court has gone so far. The rulings in—

1873. Stockdale vs. Ins. Co., 20 Wall. 323,
1910. Flint vs. Stone Tracy Co., 220 U. S. 111,
1915. Brushaber vs. U. P. R. R., 240 U. S. 1,

amount to no more than this: that Congress may levy an income tax to be payable after the enactment of the tax law, the amount of such tax to be measured by the amount of income previously received by the taxpayer.

1901. Patton vs. Brady, 184 U. S. 608,

simply holds that the Congress may levy a new or increased excise on goods which have once paid an excise, before such goods have passed into the hands of the consumer.

1913 *Billings vs. U. S.*, 232 *U. S.* 261, was this. The Act of August 5, 1909, imposed a tax of $7.00 per ton "upon the use of every foreign built yacht, pleasure boat or vessel not used or intended to be used for trade now or hereafter owned or chartered for more than six months by any citizen" of the United States.

Defendant admitted that he being a citizen of the United States had owned and used such a yacht in foreign waters during the year prior to September 1, 1909. This use was in part, viz.: August 6, 1909, to September 1, 1909, while the statute was in force. The vessel had been owned for more than six months and had been used after the act was passed. The act was not based on the extent of the use, but merely on the "use". Manifestly the owner was within the express terms of the act and the Court so held, page 282.

There was no retroactivity.

1921 *Schwab vs. Doyle*, 258 *U. S.* 529, involves no decision as to the legality of retroactive laws. The law in that case was held not to be retroactive.

1923 *Hecht vs. Malley*, 265 *U. S.* 144, 163, 164, was this: Two Massachusetts trusts were assessed for capital stock taxes under the Revenue Act of 1916 for the year ending June 30, 1919, and paid the same. Subsequently they were assessed an additional tax for the same year under the Revenue Act of 1918, approved February 24, 1919, which made the total tax equal to that for which they would have been assessed had the assessment been made under the 1918 act. In a suit to recover the taxes so paid, the Court held that the trusts were not liable under the 1916 act, but

as they were liable under the 1918 act, for more than the tax paid, no tax could be recovered.

In this case the measure of the tax was the previously existing capital of the corporation, not an isolated act previously done.

E.

The "Gift" tax is capricious and unreasonable in that—

1. In this case, the tax is retroactive in its entirety.

2. It infringes rights vested long before the enactment of the taxing act.

3. It taxes rights of ownership which by no stretch of imagination can be distinguished from rights of ownership admittedly beyond the taxing power of Congress.

Donor had in the securities given certain rights of ownership, which "rights" were and are "property," viz.:

(a) He could keep them, without collecting interest or principal;

(b) He could keep them, and collect principal and interest when due;

(c) He could destroy them;

(d) He could sell them for adequate consideration; and

in none of the four cases could the Congress, within the decisions, have the power to tax.

On the other hand, it is claimed for the Congress that it has power to tax, two other rights of ownership, which "rights" are equally with the previous four "property", viz.:

(e) The sale—if made for an inadequate consideration; Gift Law, Sec. 320.

(f) The gift.

By what logic such a classification can be sustained we are unable to see. Sales for adequate or inadequate consideration are equally transfers of title, and equally the exercise of the right of ownership. As noted, *ante* page 19, a tax on a transfer by sale is a tax on the property transferred. Is it any less such a tax because the consideration for the transfer is inadequate in "money or money's worth"?

Sales and Gifts are equally transfers of title. A tax on a Sale and a tax on a Gift alike fall, as noted, after the seller or donor has parted with title to the thing given. No difference in principle can be urged as existing between these two forms of transfer. The learned judge below says, a sale has a consideration and a gift has none. The learned judge has overlooked the fact that donors do not make gifts without some consideration which they deem adequate.

In the final analysis, therefore, this Gift Tax act asserts the right of the United States to decide what considerations shall attend all transfers of property by sale or by gift, and substitutes for the judgment of the parties to the transaction the judgment of the officials of the United States, as to what consideration shall attend every sale and every gift.

By so doing property rights are infringed, due process is denied, and property is taken without compensation.

This intent appears on the face of the Gift Tax act and brings it within the principle of the Child Labor Cases cited *ante* p. 51 and treats "a prohibition which is general as if it were confined to a particular mode of doing the particular thing."

Brown vs. Maryland, 12 Wheat. 444.

Such classification has no reasonable foundation.

1926 Schlesinger vs. Wis., Adv. Op. Mar. 15, 1926, 301.

As illustrating the arbitrary and fantastic classification of taxpayers made by this Act, attention is called to the following facts.

1. The tax falls on a resident alien or citizen who donates property outside of the United States.

A non-resident alien or citizen is free of such tax.

2. It falls on non-resident alien's or citizen's property within the United States if donated.

The non-resident alien or citizen may remove personalty from the United States, donate it, and be free of tax.

3. Citizenship in the United States is not the basis of the tax.

Residence or non-residence is.

4. John Doe may give a million in $500.00 gifts and is free of tax.

5. Richard Roe giving a like amount in gifts of more than $500.00 each is taxed enormously.

6. These classifications (4) and (5) are not based on amounts given but on the manner in which the gifts are distributed.

7. A resident citizen has an exemption of $50,000.00.

8. A non resident citizen has no exemption.

This lacks the basis of classification laid down by this Court in—

1898. Magoun vs. Ill. T. & S. Bk., 170 U. S. 283,
1897. G. C. & S. F. Ry. vs. Ellis, 165 U. S. 150,
1910. S. Ry. Co. vs. Greene, 216 U. S. 400.

FOURTH.

The attention of Court is called to the decisions in—

McNeir vs. Anderson,

decided by A. N. Hand, D. J., in the Southern District of New York, reported in 10 Fed. Repr. (2nd) 813, holding the gift tax unconstitutional, and the same case reversed by the Second Circuit Court of Appeals in—

Anderson vs. McNeir,

decided January 10, 1927.

LeFeber vs. Wilkinson, and
Nunnemacher vs. Wilkinson,

decided by Geiger, D. J., in the Eastern District of Wisconsin.

None of these cases involve the question of the gift tax as applied to a gift of state securities. All involved the question of retroactivity. Hand, D. J., held the gift tax levied to be a direct tax because unapportioned. Geiger, D. J., (whose decision is printed as Appendix B) holds the tax "direct" because its retroactivity removes the voluntary feature which accompanies an "excise".

The McNeir case was reversed by the Second Circuit Court of Appeals, that Court holding that the tax was an excise upon *one* of the rights of property which fell short of taxing *all* the rights of ownership, and therefore was not a property tax. This apparently on the authority of the Billings case.

It is submitted that if such rule is correct the Congress may indirectly tax property while directly it may not do so.

If the ruling be correct, then the Congress may levy so-called "excise" taxes separately upon every possible use of

property and thereby tax the entire property without apportionment.

This is treating "a prohibition which is general as if it were confined to a particular mode of doing the particular thing,"

Brown vs. Maryland, 12 Wheat. 444,

and is transgressing the principle that what cannot be done directly cannot be done indirectly, so many times affirmed by this Court.

FIFTH.

In conclusion it is respectfully submitted that:

1. This tax is invalid, because being levied on a gift of State securities, it is beyond the taxing jurisdiction of the Congress.

2. It is invalid, because being levied without apportionment it is beyond the taxing jurisdiction of the Congress.

3. Being beyond the taxing jurisdiction of the Congress, it transgresses the Fifth and Tenth Amendments.

4. It is so capricious, arbitrary and illogical in its classification as to make it manifest that it lacks uniformity, and was on its face primarily intended to prevent gifts and not to raise revenue, and therefore contrary to the Fifth Amendment.

5. It impairs vested rights, by reason of its retroactivity, and therefore transgresses the Fifth Amendment.

It should be certified that this tax in this case is invalid.

MARK NORRIS,

Counsel for Plaintiff-in-Error.

APPENDIX A.

SEC. 319. For the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, and upon the transfer by a non-resident by gift during such calendar year of any property situated within the United States, whether made directly or indirectly: (rates follow).

SEC. 320. If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift. Where property is sold or exchanged for less than a fair consideration in money or money's worth, then the amount by which the fair market value of the property exceeded the consideration received shall, for the purpose of the tax imposed by section 319, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

SEC. 321. In computing the amount of the gifts subject to the tax imposed by section 319, there shall be allowed as deductions:

(a) In the case of a resident—

(1) An exemption of $50,000;

(2) The amount of all gifts or contributions made within the calendar year to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees, or

fraternal society, order, or association, operating under the lodge system, but only if such gifts or contributions are to be used by such trustee or trustees or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, and the amount of all gifts or contributions made within the calendar year by such corporation, trustee, or fraternal society, order, or association for a religious, charitable, scientific, literary, or educational purpose, or for the prevention of cruelty to children or animals, and the amount of all gifts or contributions made within the calendar year to the special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act;

(3) Gifts the aggregate amount of which to any one person does not exceed $500;

(4) An amount equal to the value of any property transferred by gift within the calendar year, which can be identified (a) as having been received by the donor within five years prior to the time of his making such gift, either from another person by gift or from a decedent by gift, bequest, devise, or inheritance, or (b) as having been acquired in exchange for property so received. This deduction shall be allowed only where a gift tax or an estate tax under this or any prior Act of Congress was paid by or on behalf of the donor or the estate of such decedent, as the case may be, and only in the amount of the value placed by the Commissioner on such property in determining the value of the gift or the gross estate of such decedent, and only to the extent that the value of such property is included in the total amount of gifts made within the calendar year and not deducted under paragraph (2) or (3) of this subdivision.

(b) In the case of a nonresident—

(1) The amount of all gifts or contributions made within the calendar year to or for the use of the United States, any State, Territory, any political subdivision

thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any domestic corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees, or fraternal society, order, or association, operating under the lodge system, but only if such gifts or contributions are to be used within the United States by such trustee or trustees or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, and the amount of all gifts or contributions made within the calendar year by such corporation, trustee, or fraternal society, order, or association for a religious, charitable, scientific, literary, or educational purpose, or for the prevention of cruelty to children or animals, and the amount of all gifts or contributions made within the calendar year to the special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act;

(2) Gifts the aggregate amount of which to any one person does not exceed $500;

(3) An amount equal to the value of any property situated in the United States transferred by gift within the calendar year, which can be identified (a) as having been received by the donor within five years prior to the time of his making such gift, either from another person by gift or from a decedent by gift, bequest, devise, or inheritance, or (b) as having been acquired in exchange for property so received. This deduction shall be allowed only where a gift tax or an estate tax under this or any prior Act of Congress was paid by or on behalf of the donor or the estate of such decedent, as the case may be, and only in the amount of the value placed by the Commissioner on such property in determining the value of the gift or the gross

estate of such decedent, and only to the extent that the value of such property is included within the total amount of gifts made within the calendar year of property situated in the United States and not deducted under paragraph (1) or (2) of this subdivision.

SEC. 322. In case a tax has been imposed under section 319 upon any gift, and thereafter upon the death of the donor the amount thereof is required by any provision of Part I of this title to be included in the gross estate of the decedent then there shall be credited against and applied in reduction of the estate tax, which would otherwise be chargeable against the estate of the decedent under the provisions of section 301, an amount equal to the tax paid with respect to such gift; and in the event the donor has in any year paid the tax imposed by section 319 with respect to a gift or gifts which upon the death of the donor must be included in his gross estate and a gift or gifts not required to be so included, then the amount of the tax which shall be deemed to have been paid with respect to the gift or gifts required to be so included shall be that proportion of the entire tax paid on account of all such gifts which the amount of the gift or gifts required to be so included bears to the total amount of gifts in that year.

SEC. 323. Any person who within the year 1924 or any calendar year thereafter makes any gift or gifts in excess of the deductions allowed by section 321 shall, on or before the 15th day of March, file with the collector a return under oath in duplicate, listing and setting forth therein all gifts and contributions made by him during such calendar year (other than the gifts specified in paragraph (3) of subdivision (a) and in paragraph (2) of subdivision (b) of section 321), and the fair market value thereof when made, and also all sales and exchanges of property owned by him made within such year for less than a fair consideration in money or money's worth, stating therein the fair market value of the property so sold or exchanged and

that of the consideration received by him, both as of the date of such sale or exchange.

SEC. 324. The tax imposed by section 319 shall be paid by the donor on or before the 15th day of March, and shall be assessed, collected, and paid in the same manner and subject, insofar as applicable, to the same provisions of law as the tax imposed by section 301.